The Consumer Financial Protection Agency Act of 2009
July 10, 2009

From the same folks who brought you such fabled acronyms as TARP, PIPP, EESA and ARRA, now comes the Consumer Financial Protection Agency Act of 2009. Under this Act, the newly-created CFPA would be given extraordinarily broad powers to regulate virtually all aspects of "consumer financial products or services." The existing federal banking agencies and the FTC would be stripped of their consumer financial protection functions. Essentially, the CFPA would be comprised of the same personnel who have been roundly criticized for overlooking many of the recent abusive retail lending practices. It is expected that these individuals, unleashed from the shackles of safety and soundness supervision and central bank concerns, and granted sweeping new powers in the CFPA, would now become a more effective and forceful consumer advocate.

Whatever ones views are on the topic of regulatory culpability for the current economic crises, there remains a lingering concern that this legislation, not unlike some of the other legislative, regulatory and administrative responses to date, has been forged in the cauldron of financial crisis and tempered with a cry for public retribution---all without appropriate and thoughtful deliberation of its long-term consequences. The specific features of this legislation will be a topic of another Financial Alert, as I fully expect that there will be many more iterations before this bill sees the light of day.

One aspect of this legislation that does warrant further discussion, particularly for those institutions that are federally chartered, is the apparent death knell of the federal preemption doctrine. As evidenced by its Presidential Memorandum Regarding Preemption, dated May 20, 2009, the Obama Administration has made no bones about its deference to state power. In effect, the Act introduces a form of reverse preemption, in that its substantive provisions would not in any way annul, alter, or affect any state law, or exempt any person from complying with a state law, except to the extent that such law is inconsistent with the Act. A state law would not be inconsistent if it affords consumers greater protection than the Act, as determined by the CFPA. In practice, the difference between "greater protection" and "inconsistent protection" will be the subject of much judicial scrutiny. And unlike the current scope of judicial review of preemption matters, it does not appear that the courts will defer to the federal banking agencies. Every rule by a regulator relating to consumer protection, regardless of how well reasoned or intentioned, is subject to reverse preemption if it is deemed inconsistent with state law. For multi-state institutions, this will be an absolute nightmare.

In addition, the Act subjects national banks and federal savings associations to actions by state attorneys general to enforce state and federal consumer protection laws. This basically codifies the result achieved in the recent Supreme Court decision in *Cuomo v. Clearing House Association, LLC*, and subjects federal institutions to the prosecutorial whims of many state AG's who may have more than just consumer protection in mind.

TEL 724.935.6789 CELL 412.760.6246 FAX 724.935.6790 DIRECT 724.935.2700
vdb@vmdlegal.com
4500 Brooktree Road, Suite 103 Wexford, Pennsylvania 15090
www.vmdlegal.com